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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

BRIEF OF SWISSAIR TRANSPORT COMPANY LIMITED AND LUFTHANSA GERMAN AIRLINES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Swissair Transport Company Limited (hereinafter Swissair) and Lufthansa German Airlines (hereinafter Lufthansa) submit this brief as *amici curiae* in support of the petition for a writ of certiorari herein, to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on December 1, 1977.

Both counsel for Petitioner and Respondent have consented to the filing of this brief and the brief is submitted pursuant to Rule 42.

I

Interest of the *Amici Curiae*

Swissair and Lufthansa are international air carriers engaged in the transportation of passengers and cargo by

air into and out of the United States as well as many other countries throughout the world. The decision of the courts below in this case, if allowed to stand, will have a profound effect upon the operation of both Swissair and Lufthansa in the United States. Both Swissair and Lufthansa, carry a large amount of high value cargo into and out of the United States. Both, therefore, are extremely concerned with the standard of care to which an air carrier will be held with regard to the handling of high-value cargo in the United States. Since this standard should be pursuant to the Warsaw Convention's provisions, it should be uniform throughout the world. However, Swissair and Lufthansa believe that the standard propounded by the District Court constitutes a unique, and we think erroneous, interpretation of the Warsaw Convention that, if not changed by the Court, will seriously and adversely affect the transportation of high-value cargo into and out of the United States by air carriers.

II

Reasons for Granting the Writ

The decisions below have construed a treaty of the United States in such a way so as to conflict with: the express terms of the treaty; the intent of the drafters of the treaty; the official position of the Executive Branch of the United States Government; the reported international authority interpreting the treaty; and the existing authority in the United States.

(a) Petitioner's brief adequately demonstrates the specific ways in which the decisions of courts below are in direct conflict with the express terms of the treaty (pps. 8-10), violate the intent of the drafters of the treaty (pps. 10-12), ignore the official position of the Executive Branch

of the United States Government (pps. 12-13), and conflict with the interpretations of all international authority. Rather than belabor the Court with a repetition of these points, Swissair and Lufthansa adopt these arguments as their own.

(b) The respondent, in its Brief in Opposition at p. 5, suggests that the decision of the District Court is supported by three United States cases. Not only do these cases not support respondent, but the interpretations of the Warsaw Convention by various courts in the United States conflict with the interpretation adopted by the District Court below.

At the outset, it is important to realize that the District Court, by finding Alitalia liable on the basis of its failure to implement two measures, which the court refused to find would have avoided the loss, interpreted Article 20 to require a carrier to prove that it took *all reasonable measures whether or not they would avoid the loss.*

In *Rugami* v. *KLM Royal Dutch Airlines,* 4 Avi. 17254 (N.Y.C. Civ. Ct. 1954), which also involved a cargo loss, the court went to great length to distinguish between the presumption of liability contained in Article 18 and common law liability of a common carrier as an insurer:

> To hold that article 18 makes the defendant an insurer would render abortive any attempt by defendant to establish that it or its agents took "all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" as provided for in Article 20.

4 Avi. at 17,258. This case is further illustrative of what the Article 20 defense consists, in light of the facts adduced there to underlie liability. For instance, almost *no* secu-

rity measures had been taken. 4 Avi. 17,258-260. Next, the airline did not conform to the industry standards as far as security was concerned. Finally, the airline was held not to have established that its employees, during the robbery, were acting non-negligently.

The *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co.*, 357 F.Supp. 94 (S.D.N.Y. 1973) case is inapposite. That case did not deal with Article 20 at all. The air carrier (J.A.L.) had conceded liability and interposed no Article 20 defense. It is interesting to note, however, that based on the taking of measures far less stringent than those taken by Alitalia herein, the court said:

> Indeed, it is difficult to term either [J.A.L. or American Airlines] negligent in the handling and processing of the shipment . . .
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> • • •
>
> Moreover, on the basis of the evidence disclosed on this record, the proximate cause of plaintiff's loss was the armed robbery, and not the carelessness, malfeasance or misfeasance of the carriers . . .

357 F.Supp. at 97.

In *Ritts* v. *American Overseas Airlines*, 1949 U.S. Aviation R. 65 (S.D.N.Y. 1949), the court stated:

> [I]n order to avoid all liability it is necessary for the carrier to prove by a preponderance of the evidence that the carrier and its agents took all reasonable and necessary measures *to avoid the damage* . . .

1949 U.S. Aviation R. at 70. In that case, even though the cause of the accident was unknown, the jury returned a verdict in favor of defendant on the basis that it had shown that it had conformed to the standard of a reasonable airline. The important point here is that the inclusion of the concept of causation is essential to the Article 20 defense as part of the Warsaw Convention's liability system based on fault.

In *Geopp* v. *American Overseas Airlines*, 281 App. Div. 105 (N.Y. App. Div. 1952), the court held that causation was crucial to liability determinations under the Warsaw Convention, although in *Geopp*, the court was only dealing with Article 25.

In *Pick* v. *Lufthansa German Airlines*, 9 Avi. 18,077 (N.Y.C. Civ. Ct. 1965), the court established that there is a significant distinction between the Warsaw Convention standards of liability pursuant to Article 20 and that of common law. After quoting Article 20, the court stated:

> At common law the liability of the common carrier is often described as that of an insurer of the goods carried, and his defenses are limited to act of God or of the King's Enemies [enemies of the People of the State of New York or of the United States do not include, for this discussion, hijackers or other felons whose conduct falls short of treasonous insurrection], inherent vice of the goods, or negligence of the shipper.

9 Avi. at 10,081. (Citations omitted). The court characterized the Article 20 standard as a "somewhat lower standard of care". Whereas, as a practical matter, the District Court below has made an air carrier an insurer of high-value cargo in any case where there is a single economically reasonable measure which an air carrier might have taken even though it would not have prevented the loss.

One of the most renown commentators on the Warsaw Convention, Dr. Goedhuis, in his section on Article 20, wrote:

The capital point of the Convention of Warsaw is found in this article. As regards the rules concerning liability of the air carrier, the authors of the Convention of Warsaw were supporters of the theory of fault.

* * *

The Conference agreed to this opinion and fixed in the draft convention the principle *that the carrier is not liable if he has taken reasonable measures to avoid the damage.*

Special attention must be drawn to the great importance of the Conference accepting this principle which clearly brings out that a carrier having taken "reasonable measures" has committed no fault and therefore has not failed in the obligation the contract put upon him.

D. Goedhuis, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1st. ed. 1937), pps. 217, 219 (emphasis in the original).

This crucial question of the fault basis of the Convention has not escaped the attention of judges in the United States.

> [I]n awarding $8,300 damages [pursuant to articles 17 and 22] to the plaintiffs, [the court] implicitly found that the defendant was negligent since such an award could only have been made under the Warsaw Convention on a finding of negligence.

Berguido v. *Eastern Air Lines, Inc.*, 369 F.2d 874, 881 (3d Cir. 1966) (dissent of Kalodner). The decision of the District Court is, therefore, contrary to the interpretations of courts in the United States of the Warsaw Convention.

This fundamental error of the District Court, in eschewing the fault basis of the Convention, is of tremendous importance. As a practical matter, it will put airlines in the position of being insurers of all high-value cargo. This, in turn, will gravely affect the ability of Swissair and Lufthansa to carry high-value cargo as at present.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated: April 12, 1978

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12th day of April, 1978, served the foregoing Brief of Swissair Transport Company Limited and Lufthansa German Airlines as *Amici Curiae* in Support of the Petition for a Writ of Certiorari upon the parties to the action by depositing same in a United States mailbox at 608 Fifth Avenue, New York, New York 10020, with first class postage prepaid addressed to:

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